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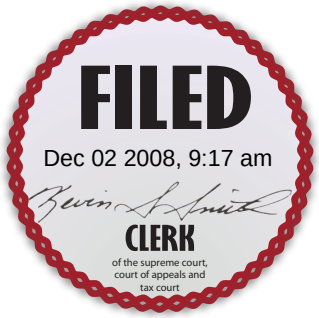

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IN THE COURT OF APPEALS OF INDIANA

CHRISTOPHER MONTGOMERY,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0804-CR-343
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Robert Altice, Judge
Cause No. 49G02-0704-MR-55165

December 2, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Christopher Montgomery appeals his conviction of Murder,[1] a felony, and Neglect of a Dependent,[2] a class C felony, challenging each of those convictions on grounds of insufficient evidence.

We affirm in part and reverse in part.

The facts favorable to the convictions are that in March 2007, Montgomery lived in a hotel with his long-time girlfriend, Courtney, and her children, Casey, and four-year-old Elijah Simpson. At approximately 7:00 p.m. on March 29, Courtney went to work while Montgomery stayed in the room to babysit the children. At some point during the evening, Montgomery became angry when Elijah sucked his thumb, ordered him to stop, and then ordered the child to stand in the corner. He remained there for hours until Montgomery ordered the boys to bed around 11:00 p.m. Whenever Elijah began sucking his thumb as he slept, Montgomery would awaken him and order him to stop. Courtney arrived home from work at about 2:00 a.m. and went to bed, while Montgomery remained awake playing video games. At about 5:00 a.m., Courtney awakened to hear Montgomery say to Elijah in a "loud", "aggressive" tone, "Get up little nigga, go – get your ass in the corner." *Transcript* at 132. Elijah obeyed and stood in the corner. After he had been standing there for approximately two hours, Courtney heard Montgomery say in an aggressive voice, "come here … stand by the bed." *Id*. at 134. Elijah turned and looked at Montgomery "like he was scared", but did not move toward the bed. *Id*. at 135. This angered Montgomery, who walked to Elijah, grabbed him by one arm and one leg, raised him to about the level of his

[1] Ind. Code Ann. § 35-42-1-1 (West, PREMISE through 2007 1st Regular Sess.).
[2] Ind. Code Ann. § 35-46-1-4 (West, PREMISE through 2007 1st Regular Sess.).

(Montgomery's) head, and then threw him to the floor. Elijah cried out and then immediately began having a seizure. Courtney picked Elijah up and told Montgomery they needed to take the child to the hospital. Montgomery responded,

> I don't know how you [sic] getting there, you [sic] not taking my car. And if you call the police, or the ambulance, or your family, then you gonna be dead before they get here. So you pick one. Make a choice. … You better act like you understand. You here [sic] me talking to you?

Id. at 138. Courtney noted that Elijah's seizure had subsided by that point and therefore thought he would be "okay". *Id*. She laid down and went back to sleep. When she woke up sometime later, Elijah was not breathing. She told Montgomery they needed to take Elijah to the hospital. Montgomery panicked, saying, "Oh, not my little nigga. I don't want to go to the jail." *Id*. at 140. They drove Elijah to the hospital and during the drive, Montgomery instructed Courtney not to tell anyone what had happened. Efforts undertaken at the hospital to save the child's life proved unsuccessful and Elijah was pronounced dead. Police were summoned and started an investigation.

When questioned at the hospital, Courtney provided few details about what had happened, saying only that Elijah had suffered a seizure. Police drove to the motel and questioned Montgomery. He claimed he had left the motel that morning around 8:00 to buy new tires, and when he returned he found Elijah dead in his mother's arms.

An autopsy was performed upon Elijah's body the next morning, and it was discovered that Elijah had a fresh, four-inch fracture of the occipital bone on the back of his skull. This fracture had caused a thick subdural hematoma. Moreover, Elijah's brain had been shaken from one side to the other in his skull with sufficient force to cause contusions

on both sides of his temporal lobes. A medical doctor stated that the force necessary to cause such an injury would have been "major", and the equivalent of a car crash. *Id*. at 284. Police again interviewed Courtney, and this time she related the events resulting in Elijah's death, as detailed above.

Montgomery was arrested and charged with, among other things, murder, multiple counts of neglect of a dependent, and possession of a firearm by a serious violent felon. He was convicted on all counts following a jury trial. The court entered judgment of conviction on the murder count, two counts of neglect of a dependent – as an A felony under Count 3 for failing to seek immediate medical help after Elijah sustained his head injury, and as a C felony under Count 6 for making Elijah stand in the corner in the middle of the night for sucking his thumb - and possession of a firearm by a serious violent felon. The court sentenced Montgomery to fifty-five years for murder, which was to run concurrent with a six-year sentence for the firearm conviction and the four-year sentence for Count 6 (standing in corner), all of which were to run consecutive to the ten-year sentence imposed for his conviction under Count 3 (failing to seek medical help), resulting in a total executed sentence of sixty-five years.

Montgomery challenges his convictions of murder and neglect of a dependent as a class C felony under Count 6 on grounds that there was insufficient evidence to support them. When considering a challenge to the sufficiency of evidence, we neither reweigh the evidence nor judge witness credibility. *McHenry v. State*, 820 N.E.2d 124 (Ind. 2005). This review "respects 'the [fact-finder]'s exclusive province to weigh conflicting evidence.'" *Id.* at 126 (quoting *Alkhalidi v. State*, 753 N.E.2d 625, 627 (Ind. 2001)). Considering only the

probative evidence and reasonable inferences supporting the verdict, we must affirm "'if the probative evidence and reasonable inferences drawn from the evidence could have allowed a reasonable trier of fact to find the defendant guilty beyond a reasonable doubt.'" *McHenry v. State*, 820 N.E.2d at 126 (quoting *Tobar v. State*, 740 N.E.2d 109, 111-12 (Ind. 2000)).

We begin with Montgomery's claim that there was not sufficient evidence to support the murder conviction. Montgomery contends the State's evidence is fatally insufficient in that "there is a lack of evidence or testimony as to how Elijah was thrown and Mr. Montgomery knowingly or intentionally applied that level of force to cause Elijah's death." *Appellant's Brief* at 13. We understand Montgomery's first contention, i.e., that the evidence did not show how Montgomery threw Elijah to the floor, to be that the evidence did not establish that Montgomery's action of throwing Elijah to the floor could have or did cause Elijah's ultimately fatal injuries. To the contrary, Courtney testified that Montgomery grabbed the child by an arm and a leg, raised him up nearly over his head, and then "threw" him to the floor. *Transcript* at 135. Almost immediately, Elijah began having a seizure, and he died within a few hours, apparently without ever having regained consciousness. Moreover, before Montgomery threw him to the floor, Elijah was functioning normally, both physically and cognitively. An autopsy performed shortly after death revealed a skull fracture and resultant brain trauma of the sort one would expect to see in a serious automobile accident. A physician at trial testified that such injuries would render a person "very lethargic or unconscious", or "moaning" and suffering "seizure like activity" "from the moment [the injury] occurred on." *Id.* at 295. This testimony squares with Courtney's account of the events of that morning and, most especially, with Elijah's condition from the

moment he was thrown to the floor and thereafter. This evidence was easily sufficient to prove that Montgomery's act of throwing Elijah to the floor was the cause of the skull and brain damage noted during the autopsy of Elijah's body.

To the extent Montgomery challenges the quantum of proof of intent to kill, this challenge is equally unavailing. "Intent to kill may be inferred from the nature of the attack and the circumstances surrounding the crime." *Kiefer v. State*, 761 N.E.2d 802, 805 (Ind. 2002). The evidence shows that Montgomery picked up a small child, lifted him to a height of at least five feet above the floor, and then dashed him to the floor flat on his back with a force equivalent to a serious automobile accident – a force that would have been what the doctor who performed the autopsy on Elijah termed a "major" force. *Transcript* at 284. The force was so great, in fact, that it caused a fracture of Elijah's left occipital skull – a bone that in a four-year-old child is supple and requires great force to fracture. Montgomery slammed Elijah down in this manner against a tile floor, which of course provided no cushion for the blow. Under these circumstances, Montgomery's intent to kill Elijah may reasonably be inferred beyond a reasonable doubt. The evidence was sufficient to sustain the murder conviction.

Montgomery also challenges the conviction for neglect of a dependent as a class C felony on grounds of insufficient evidence. Montgomery was charged under I.C. § 35-46-1-4(a)(2) which provides, "A person having the care of a dependent, whether assumed voluntarily or because of a legal obligation, who knowingly or intentionally … abandons or cruelly confines the dependent … commits neglect of a dependent", which rises to the level of a class C felony if it results in bodily injury.

This court has determined that "cruelly" as used in I.C. § 35-46-1-4(a)(2) means "'confinement which is likely to result in a harm such as disfigurement, mental distress, extreme pain or hurt, or gross degradation, and yet does not necessarily endanger the dependent's life or health.'" *Demontigney v. State*, 593 N.E.2d 1270, 1272 (Ind. Ct. App. 1992) (quoting *Hartbarger v. State*, 555 N.E.2d 485, 487 (Ind. Ct. App. 1990), *trans. denied*)). "[T]he cruel nature of a confinement 'is to be determined by an objective standard.'" *Demontigney v. State*, 593 N.E.2d at 1272 (quoting *Hartbarger v. State*, 555 N.E.2d at 487). Having said this, we note that the parameters of this "objective standard" are not easily articulated. A survey of cases that have addressed this question reveals that the standard has not been specifically defined, but rather merely applied. Thus, we are left to review on a cases-by-case basis what courts have determined does and does not constitute cruel punishment in this context.

In *Demontigney*, the six-year-old child victim was chained to his bed by a very short chain. Thus confined, the boy could not reach a bathroom and when he was discovered by police, his room reeked of urine, his clothes and bed linens were soaked and stained with urine, and he had defecated in his pants. Moreover, the child had been chained long enough that he was calling out his window to his neighbors asking for food because he was hungry. This was deemed in violation of I.C. § 35-46-1-4. In *Poling v. State*, 853 N.E.2d 1270 (Ind. Ct. App. 2006), the victims/children were locked in their bedrooms at night and would sometimes be forced to urinate on themselves when the defendant would not allow them out to use the restroom. Also, they were "hog-tied" with duct tape, with the tape sometimes placed over their mouths and wrapped around their heads. This was deemed to be "cruel"

within the meaning of I.C. § 35-46-1-4. In *Hartbarger*, on the other hand, we concluded that merely confining a sixteen-year-old male to his room at night for two weeks was not cruel.

It seems that the standard to be applied is objective, but also quite fact-sensitive. Therefore, rather than strive for a precise articulation of what constitutes "cruel" punishment in this context, we are perhaps better served by remembering the purpose of the statute.

The purpose of the neglect statute is the protection of children, but we must also bear in mind the potentially conflicting right of parents to discipline their children. *See Hartbarger v. State*, 555 N.E.2d 485. Clearly, the infliction of pain cannot be the only consideration. "Certainly not all punishment is cruel, … yet in some sense all punishment causes pain or hurt." *Id*. at 487. Our Supreme Court has stated that the neglect statute "is to be regarded as applying to situations that endanger the life or health of a dependent. The placement must itself expose the dependent to a danger which is actual and appreciable." *State v. Downey*, 476 N.E.2d 121, 123 (Ind. 1985). In *Gross v. State*, 817 N.E.2d 306, 309 (Ind. Ct. App. 2004), we stated,

> It seems clear that to be an "actual and appreciable" danger for purposes of the neglect statute when children are concerned, the child must be exposed to some risk of physical or mental harm that goes substantially beyond the normal risk of bumps, bruises, or even worse that accompany the activities of the average child. This is consistent with a "knowing" mens rea, which requires subjective awareness of a "high probability" that a dependent has been placed in a dangerous situation, not just any probability.

The gravamen of the situation this statute is intended to address is further revealed in *Armour v. State*, 479 N.E.2d 1294, 1297 (Ind. 1985), where our Supreme Court determined that the mental element of this offense requires proof that "the accused must have been subjectively aware of a high probability that he placed the dependent in a dangerous situation."

With the foregoing in mind, we conclude that the facts upon which the charge was based, which consisted only of making the child stand in the corner for two hours as a means of punishment, while ill-advised and almost certainly ineffective, does not, without more, constitute "cruel" punishment or the felonious behavior this statute was intended to address. Therefore, the evidence was not sufficient to support this conviction and it must be reversed.

Judgment affirmed in part and reversed in part.

DARDEN, J., and BARNES, J., concur